IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 41.

CHESTER G. BOLLENBACH,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

REPLY BRIEF ON BEHALF OF THE PETITIONER.

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In this brief we do not repeat what is urged in our main brief. A few matters in the Government's brief, however, require reply.

I.

THE GOVERNMENT'S BRIEF CONSTITUTES A COMPLETE CHANGE OF POSITION ON ITS PART.

The position taken by the prosecution in the court below, and in this Court on the defendant's application for a writ of certiorari, is set forth at pages 10-11 of the brief of the United States filed in opposition to the petition for certiorari. There the following appears:

> "*The jury had apparently also already agreed that petitioner was not himself guilty of transporting the bonds,* since their question [referring to fol. 1041: 'If the defendant were aware that the bonds which he aided in disposing of were stolen, does that knowl-

edge make him guilty on the second (i.e., conspiracy) count?'] was directed only to the conspiracy count of the indictment. Manifestly the jury was trying to determine whether petitioner could lawfully be convicted of conspiracy *although he participated in the transaction only after the bonds were brought to New York*, and they apparently interpreted the judge's instruction as authorizing a conviction on such basis . . . *That the jury did not rely upon the judge's instruction that the possession of the bonds raised an inference that the possessor had transported them and did not rely upon the testimony of the clerk of the district court [meaning the witness Chell Smith] that petitioner had been in the court house in Minneapolis, is shown by the fact that they acquitted him on the substantive count.*"

Now all this (and more, as will appear below) is repudiated by the Government. Apparently realizing that the conviction of the defendant cannot stand if it be conceded, as above, that "he participated in the transaction only after the bonds were brought to New York", the Government now contends to the direct contrary. To that end, it insists that the defendant was party to the theft itself or to an initial conspiracy to steal and transport the bonds. Of course that contention flouts the verdict of the jury. Never would they have acquitted the defendant of the substantive crime, if they had believed that he stole the bonds, or caused or cooperated in the theft or transportation of the bonds. That, too, the Government conceded to be the fact heretofore: "The jury had apparently also already agreed that the petitioner was not himself guilty of transporting the bonds", the Government heretofore told this Court.

In support of its complete turnabout, the Government relies on the evidence of the witness Chell Smith that in January or February, 1937, he saw the defendant in the

Minneapolis court house. That is the self-same evidence concerning which the Government heretofore advised this Court that the jury "did not rely upon the testimony of the clerk of the district court that petitioner had been in the court house in Minneapolis."

And no reasonable juror could do otherwise than reject that evidence. The so-called identification was made over five years after the event. The defendant never was in Minneapolis. On January 31, 1937, Burns, who had been in Minneapolis a short while before and who probably had taken the bonds, already had them in New York City. The next day the defendant was in a hotel in Pennsylvania and attended a stockholders' meeting there (pp. 322-26; Ex. E, p. 400). That was February 1, 1937. At the trial of the other defendants named in this indictment, the witness Chell Smith was conceded to have stated that this defendant was in Minneapolis on February 1, 1937 (fols. 930-31). Of course that was impossible. Hence, at this trial, the witness boldly denied that that had been his prior evidence (fols. 102-4). At the other trial, he had also stated that a Miss Williams, a deputy clerk, had called his attention to the defendant on the occasion in question (fols. 112-13); on this trial, however, he declared that he "never heard of Miss Williams" (fol. 111). He claimed to have been in the room where he said he saw the defendant "five minutes or a little less" (fol. 126); yet more than five years later, he was able, not only to dissociate the defendant from the numerous callers at the clerk's office, but to give details concerning his attire (fols. 129, 133). He asserted that United States investigator Paulson was the only government agent he ever saw about this case (fol. 156). Although he stated that he was "sure that is right" (*id.*), it soon appeared he had dealings also with F. B. I. agents Milenky and Keating as well (fols. 158, 170). It is unnec-

essary to pursue the matter. The court below admitted that "the testimony of Chell Smith * * * was not convincing" (fol. 1315); that "had [they] been on the jury, [they] should indeed have laid little weight upon the identification" and that "its credibility was for the jury" (fol. 1305). The verdict acquitting the defendant of the substantive crime shows plainly how the jury regarded that evidence. Just as the Government has heretofore conceded, they refused to give it any credence whatever.

Now, however, the Government virtually stakes its whole case on maintaining that the jury found Chell Smith's evidence to be true, and hence that the defendant was in the Minneapolis court house. To sustain its contentions in that respect, the Government now argues that the conviction on the second count, the conspiracy charge, effectuates that result. That contention has no support in fact or reason. It is very plain what caused the conviction herein. After long hours of deliberation, the jury had apparently agreed that the defendant had neither helped to steal nor to transport the bonds, and thereupon it inquired of the court (fol. 1041) whether "if the defendant were aware that the bonds which he aided in disposing of were stolen * * * that knowledge [would] make him guilty on the second [or conspiracy] count?" The response of the trial judge manifestly led them to conclude that the answer to that question was "Yes"; for thereupon they *forthwith* reported a verdict of guilty on the conspiracy count (fol. 1044). Manifestly nothing was farther from the minds of the jury than that they were finding that Chell Smith's evidence (which they had already rejected) was true for any purpose, or that the defendant had had any part in the theft or transportation of the bonds. All that they meant to find was (1) that the defendant had aided in disposing of the bonds, and (2) that he was then aware that they were stolen. That is precisely

what their question to the court implies and all that it implies (fol. 1041).

This was not a compromise verdict, or any endeavor of the jury to misbehave itself and condone one offense while inconsistently convicting of another. This jury was undertaking honestly to find the facts and to obey the instructions of the court. Bearing that in mind, it is patent, we submit, that there is no room for the labored argument of the Government that the record should be perverted into finding that the defendant took part in the theft or transportation of the bonds. As the court below and the Government in its prior brief in this Court agreed, and as the final question of the jury unmistakably showed, the defendant's participation in the transaction concerned only the disposition of the bonds after their transportation to New York was over and done.

The foregoing extract from the Government's prior brief herein furthermore shows that it did not deny that the trial court fell into error, when, in answer to the jury's final question, the judge told the jury, among other things, that the possession of the bonds created a presumption that the possessor was the thief and had transported the stolen property in interstate commerce (fols. 1041-42). The Government then contented itself by claiming "that the jury did not rely upon the judge's instruction that the possession of the bonds raised an inference that the possessor had transported them" Now, however, the Government claims that the presumption was quite correct (brief, pp. 19, 58 *et seq.*). The court below admitted that that presumption was erroneous (fols. 1310, 1313). Its unreasonableness is patent; indeed, it is doubtful whether even an act of Congress could validly engraft such a presumption on our law. *Tot* v. *United States,* 319 U. S. 463, 467-69. Even the Government's brief (pp. 65-66) has to concede that. It declares:

> "We agree that it would be unreasonable to infer merely from the fact of possession that the stolen goods had been transported in interstate commerce. Such a presumption would be as unjustified as were the statutory presumptions rejected by this Court in *Tot* v. *United States*, 319 U. S. 463."

The "presumption" had its effect on the jury, however. They knew that the evidence gave no countenance to the claim that the defendant had had any part in the theft or transportation of the bonds. They knew that what the defendant did related entirely to the disposition of the bonds. They therefore rightly decided to acquit him of the substantive crime. They, however, wanted additional light on the conspiracy charge. So they addressed a question to the court. Thereupon they were told about this erroneous presumption, among other things. Quite naturally they concluded that the trial judge was telling them, in response to their question, that the defendant could be convicted of conspiracy to transport stolen securities (even though he in fact had no part in their theft or transportation, and had only helped to dispose of them after the transportation was finished), because there was a rule of law affecting conspiracy cases, "a presumption" the court called it, that any possessor of stolen bonds was the thief and had transported them in interstate commerce. The tenor of the whole instruction to the jury was that that "presumption" was enough to warrant them in finding the defendant guilty on the second or conspiracy count; and the trial judge sharply cut off the attempt of defendant's counsel to clarify what the court was giving to the jury as his last word of advice (fols. 1042-43). Accordingly the jury convicted the defendant of conspiracy. Obviously, if the lower court had not led the jury into that wholly mistaken view of the crime of conspiracy, they would have acquitted

the defendant of the second charge also. Now the Government requests this Court to regard those final and fatal instructions as merely "cursory" and "nothing more" (brief, pp. 34-5).

At considerable length the trial judge had charged the jury that the defendant would be guilty of the substantive offense, if he in any way knowingly participated therein; if he transported or caused the bonds to be transported (fols. 999-1003); or if he was party "to any plan to transport the bonds" (fol. 999), or "any arrangement" or "any agreement" to that end (fol. 1001); or "entered into a scheme to * * * steal the bonds and transport them" (fol. 1002); or aided and abetted others so to do (fol. 1001). All that, the jury had determined was not the fact when it reached the conclusion that the defendant was not guilty of the substantive crime. Now, however, the Government would have this Court assume the contrary.

Where a jury finds a verdict which on its face discloses that it has set at naught the directions of the trial judge, so far as one or some counts of the indictment are concerned, there is justification in regarding what the jury has done as a compromise and an impropriety, and in refusing to extend the implications of that action to the other counts on which the jury has found the defendant guilty. That is, however, emphatically not the situation in the case at bar. Here it appears that the jury scrupulously obeyed the judge's directions. After hours of deliberation, it could not, in good conscience, find that the defendant had had anything to do with the theft and transportation of the bonds. Having, as Government itself heretofore advised this Court, "agreed that petitioner was not himself guilty of transporting the bonds," it then took up the conspiracy charge and thereupon addressed to the trial judge the question concerning that offense. On

receiving his answer to the question as to the effect of the defendant's participation in the disposal of the bonds in respect of the conspiracy charge, they believed that that instruction warranted a verdict of guilty on the conspiracy count. *That result was patently a compromise.* Never before has anyone in this Court or in the courts below charged that this jury was guilty of misbehavior, that their verdict was a compromise. Only now, for the first time, does the Government assert that; and it thus belatedly impugns the good faith of the jury because it cannot support the conviction herein, if the plain meaning and effect of the acquittal on the first count are adhered to. There is, we submit, no warrant in law for such a procedure. There is, we submit, nothing to justify the Government's contention that this defendant was a party to either the theft or the transportation of the bonds. The court below accepted that view. The Government itself agreed to it when it opposed the application for a writ of certiorari herein. Only now has it concluded to change front and argue the contrary, only now does it purport to have discovered that the jury were false to their oaths.

The suggestion that the trial court "was shocked at what he regarded as an inconsistent—evidently a compromise—verdict" (brief, p. 26), has no support in the record. The trial judge, in sentencing the defendant, did express disappointment that the verdict was not against the defendant on both counts (fol. 1045). But he was careful to add: *"I am not criticising you jurors"* (*id.*), a declaration which he would never have uttered, if he had thought, for a moment even, that the jury had betrayed their trust and rendered a shocking, inconsistent, compromise verdict.

II.

THE GOVERNMENT'S BRIEF ABANDONS THE ONLY GROUND ON WHICH THE COURT BELOW SUSTAINED THE CONVICTION.

The Court will not fail to observe that the Government confesses that this defendant was neither tried nor convicted as an accessory after the fact; that that theory was invented by the court below; that the defendant's conviction was upheld on that theory; and that it is indefensible (brief, pp. 17, 24, 36, 47). The Circuit Court of Appeals, nevertheless, rested on that theory as the sole basis for sustaining the judgment now under review (fols. 1309-10). It may well be that, if the Government had made that concession when the motions for rehearing were before the Circuit Court of Appeals, that court would not have affirmed the conviction at all, and the defendant would be free. Probably because the confession of error comes so belatedly, this defendant still remains a convicted felon.

III.

THE DEFENDANT'S ACTS IN DISPOSING OF THE BONDS AFTER THEY WERE TRANSPORTED TO NEW YORK CONSTITUTED NO PART OF THE CONSPIRACY CHARGED.

The statutes involved in the case at bar carefully differentiated between the transportation of stolen securities and their disposition. Section 415 of Title 18 of the United States Code, as it stood when the alleged offenses were committed, made it criminal to transport such securities in interstate commerce. It, however, said nothing about their disposition after such transportation. Section 416, as it stood when the alleged crimes were committed, did make mention of the disposition of the subject matter of the theft. It did not, however, concern itself with the disposition of

the stolen property, unless that property was stolen "while moving in or constituting a part of intersstate or foreign commerce." If property was stolen while itself in interstate commerce, then, and then only, was its disposition a federal offense.

In this case, however, the indisputable facts left no room for a charge under section 416: the bonds in question were not moving in or a part of interstate commerce when they were stolen. Only after they had been stolen did they ever enter into interstate commerce.

The foregoing considerations lead to some perfectly clear conclusions: (1) Inasmuch as Congress did not even refer to the subject of disposition of stolen securities in section 415, it is plain that that section had no reference to that subject. When Congress desired to deal with that subject, it did so in unmistakable terms, as section 416 reveals. (2) Inasmuch as Congress in section 416 laid its prohibition on only one variety of disposition of stolen goods, *i.e.*, those stolen while moving in interstate commerce, it is not permissible to assume or imply that it intended to make criminal any and every other form of disposition of stolen securities.

It is in the light of those principles that the indictment in the case at bar is to be read. Its first count charged merely the transportation of stolen securities; its second count charged merely a conspiracy to transport such securities. That is the natural reading of the indictment. It did not charge anything whatever concerning the disposition of the securities. The substantive crime had and could have no relation to the disposition of the securities. Section 415 had no relation to that; and section 415 was the section on which the first count was predicated (fol. 10). Section 416 was not involved, as the Government itself conceded in its

brief in the court below (p. 16), and only that section had to do with disposition of securities in any respect.*

The conspiracy count is and had to be similarly limited. It alleged a conspiracy "to commit an offense against the United States, to wit, to violate Section 415, Title 18, United States Code" (fol. 12). That meant a conspiracy unlawfully *to transport* stolen securities, and not one to do anything else. The conspiracy had and could have no other or broader object. It certainly did not charge a conspiracy to dispose of such securities; that was not a subject embraced by the section referred to; and there was no reference even made to section 416, the only section which had anything to do with disposition of stolen securities of a very limited (and here wholly irrelevant) kind. The conspiracy before this Court, therefore, is one to transport the stolen bonds from Minneapolis to New York, and nothing more. It has no other, or different, or larger scope, object, or purpose.

In a variety of forms and at much length, the Government's brief, attempts to expand the conspiracy charge, so as to make it include, not merely the transportation which is all that it embraces, but everything concerning the disposition of the bonds which ensued after the termination of the alleged transportation. There is no warrant for that (1) in the language of the controlling statutes, or (2) in the language of the indictment itself. Here, too, the Government finds itself in conflict with the holding of the court below. Concerning the disposal of the securities after their transportation had ended, the Circuit Court of Appeals ruled (fol. 1309):

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* "That [*i.e.*, "receiving and disposing" of the bonds] was not the charge in the indictment", said the prosecution's brief (p. 16) in the court below.

> "* * * that was not any part of the crime for which he had been indicted; the substantive crime—and also the conspiracy to commit it—ended when the notes came to rest in New York."

It would serve no useful purpose to analyze in detail the numerous authorities to which the Government's brief here makes reference in this connection (p. 48 *et seq.*). They all concerned indictments which charged conspiracies broad enough to include more than mere transportation. In such cases, proof of what followed the transportation may have been within the scope of those conspiracies. But that is not so here. The indictment is limited to a conspiracy to transport; it has therefore nothing to do with any other conspiracy, like one to dispose of the matter transported. The statute itself sets apart from one another transportation and disposal; and hence the Court is not at liberty to say that they are one and the same, or that one is a part of the other. Transportation is not disposal and does not include it in this case. Other enactments and other indictments may be otherwise.

This defendant may not be convicted of a crime with which he is not charged in the indictment. It is therefore pointless to urge or intimate that he is guilty of offenses which are not charged in the indictment and which may not even be offenses against the United States. *Spies* v. *United States*, 317 U. S. 492, 500.

IV.

Other matters.

The long brief of the Government contains numerous other assertions of fact and law with which we differ. We must, however, leave them unnoticed. Not only would it extend this reply to an inordinate length to deal with them

but there is no time available for that purpose. We make mention of that, only in order that the Court may not regard our silence as acquiescence in those declarations.

Conclusion.

For the reasons set forth in this and in our main brief, it is submitted that the judgment of the court below is erroneous and should be reversed.

Respectfully submitted,

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